

**Alpha Resins Corporation and Richard Allen.** Case  
26-CA-12971

July 10, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On January 8, 1992, Administrative Law Judge Robert A. Gritta issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, as explained below, and to adopt the recommended Order.

On remand the judge specifically credited the testimony of employee Richard Allen regarding what Allen said at his December 16, 1988 meeting with Supervisor Walter Morialli and Plant Manager George Sutch, and the judge specifically discredited the testimony of Morialli and Sutch. As noted above, we find no basis for reversing his credibility findings.

The judge, however, in his analysis made some factual findings inconsistent with Allen's credited testimony. In this regard, the judge stated that Allen "did on several occasions during the [December 16] meeting tell Morialli that he would 'whip his ass.'" The judge also found that Allen characterized Morialli as a "liar." Allen in his testimony denied making these remarks, and the judge credited this denial. Morialli and Sutch testified as to these remarks, and the judge discredited their testimony. In light of the judge's credibility findings, it is clear that these factual findings of the judge are erroneous, and we find that Allen did not make these remarks.<sup>2</sup> These erroneous findings, how-

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Further, the Respondent contends that the judge was prejudiced and biased and that his credibility resolutions and findings reflect his preconceived conclusions. We find this contention to be without merit. On our full review of the record and the judge's supplemental decision, we perceive nothing in his findings, conclusions, and recommendations which indicates that the judge prejudged this matter or that his findings, conclusions, and recommendations demonstrate prejudice and bias against the Respondent.

<sup>2</sup> Allen testified that, at the end of the December 16, 1988 meeting, he stated, "The best thing for me to do is get up and get out

ever, do not affect our affirmance, based on Allen's credited testimony, of the judge's ultimate finding that Allen at the December 16, 1988 meeting was engaged in protected concerted activity<sup>3</sup> and that he was discharged because of this activity.<sup>4</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alpha Resins Corporation, Piperton, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

of here before I wind up saying something and I'll regret it and I'll kick your ass and I'll get fired." We find that this remark states what Allen would do to *avoid* further confrontation. In addition, the remark was unaccompanied by any physical gestures. In these circumstances, the remark does not convey a threat of actual physical harm and was not so egregious as to render his concerted activity unprotected. See *Leasco, Inc.*, 289 NLRB 549 fn. 1 (1988).

<sup>3</sup> In addition to the reasons stated by the judge for finding that Allen was engaged in protected concerted activity at the December 16, 1988 meeting, we note that Allen, in voicing complaints, consistently used the pronouns "we" and "us," thereby evidencing that Allen was speaking on behalf of himself and other employees. See *Oakes Machine Corp.*, 288 NLRB 456 (1988), enf'd. in pertinent part 897 F.2d 84 (2d Cir. 1990).

<sup>4</sup> It should be noted that, even though the judge found that Allen made these remarks, he further found that under the circumstances these remarks did not render unprotected Allen's concerted activity.

*Grace Speer, Esq.* and *Melvin L. Ford, Esq.*, for the General Counsel.

*Fletcher L. Hudson, Esq.* and *Kenneth D. Henderson, Esq.* (*McKnight, Hudson, Lewis, Henderson & Clark*), of Memphis, Tennessee, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on September 27, 28, and 29, 1989, in Memphis, Tennessee, based on a charge filed by Richard Allen, an individual (Charging Party) on December 27, 1988, and a complaint issued by the Regional Director for Region 26 of the National Labor Relations Board on February 6, 1989.<sup>1</sup> The complaint alleged that the Alpha Resins Corporation (Respondent) violated Section 8(a)(1) and (3) of the Act by discharging Richard Allen because he engaged in concerted activity by complaining to Respondent about wages, hours, and working conditions and because Allen engaged in union activity. Respondent's timely answer denies the commission of any unfair labor practices.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel and Respondent. Both briefs were duly considered.<sup>2</sup>

<sup>1</sup> All dates are in 1988 unless otherwise specified.

<sup>2</sup> As stated in brief, Respondent's counsel did request that E. Exh. 7 be placed in the rejected exhibit file. The exhibits of record should

*Continued*

My decision, JD(ATL-10-91), issued on March 27, 1991. On November 4, 1991, the Board remanded the case to me for the limited purpose of making findings of fact and credibility resolutions regarding the statements allegedly made by Richard Allen during his December 16, 1988 meeting with Walter Morialli and George Sutch and, if appropriate, making revised conclusions of law and recommendations regarding Allen's discharge. The Board further ordered that I prepare and serve on the parties a supplemental decision setting forth the resolution of such credibility issues, findings of fact, conclusions of law, and recommendations, including a recommended Order.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION AND PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Alpha Resins Corporation is a Tennessee corporation engaged in the manufacture of resins for fiberglass in Piperton, Tennessee. Jurisdiction is not in issue. Alpha Resin Corporation, in the past 12 months, in the course and conduct of its business operations, purchased and received at its Piperton, Tennessee facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Tennessee. During the same period of time Alpha Resins Corporation sold and shipped products from its Piperton, Tennessee facility valued in excess of \$50,000 directly to points outside the State of Tennessee. I conclude and find that Alpha Resins Corporation is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. OVERVIEW

The original industrial entity was Alpha Chemical Corporation. In 1981 it became a holding company named Alpha Corporation of Tennessee with headquarters at Piperton, Tennessee. The assets of the holding company are the individual companies housed in the area complex at Piperton. In addition to Alpha Resins Corporation, the facility involved in this proceeding, there are Promi-Tech, which produces pigments; Glass Steel Tennessee, which produces fiberglass panels; and Glass Steel Industrial Laminates, which produces circuit boards for industrial use. Each individual company has its own premises within the area complex and the holding company has corporate headquarters and a lab in the same area complex. Jerry Stauffer and George Carey are vice presidents of the holding company as well as each individual company comprising the area complex. Each individual company is headed by a manager who has the freedom to operate and administer on a daily basis. Stauffer and Carey exercise oversight of all the individual companies and the holding company in legal matters and personnel matters, respectively.

therefore include ER-7 in the rejected exhibit's file. Respondent should supply all parties and the record with copies of ER-7.

##### III. ISSUES

1. Whether Richard Allen was discharged because he engaged in protected concerted activity constituting a violation of Section 8(a)(1) of the Act.

2. Whether Richard Allen was discharged because of his prior union activities constituting a violation of Section 8(a)(3) of the Act.

Pertinent testimony is restated below.

##### IV. THE ALLEGED UNFAIR LABOR PRACTICES

*Richard Allen* testified he is currently employed at Aragon Trucking in Memphis, Tennessee, as a driver, trainer, and safety supervisor. Allen was previously employed by Respondent as a driver and driver trainer. He taught defensive driving to all new drivers after becoming licensed as a trainer in 1987. In August 1987, he and Morialli instructed all 14 drivers in defensive driving. During Allen's employment from June 1978 to December 1988, he was not disciplined. In addition he received safety bonuses for 9 consecutive years, i.e., no accidents or tickets.

In 1983 a union organizing campaign was conducted and resulted in an election with a tally of 14 against the Union and 1 for the Union. Following the election a company picnic was attended by Allen and his wife. Allen met Carey at the picnic and Carey stated, "I want the son-of-a-bitch that voted yes." Allen replied, "I don't know who voted yes."

In 1985, Burriss, the president of Alpha Corporation, met with Danny Lewis, Morialli, and Allen at the corporate offices. Lewis, Allen, and Morialli complained to Burriss about the dispatch of drivers. The seasonal use of outside drivers was reducing the weekly mileage of regular drivers. Allen told Burriss that the regular drivers wanted at least 2000 miles per week. Burriss checked some records and called George Carey to the meeting. Burriss told Carey to straighten out the problem. Carey told dispatch to give the senior drivers 2000 miles per week. For 6 weeks everything was fine, then the younger drivers complained they were not getting enough miles. The dispatch was then changed to equal miles with the senior drivers getting first pick on Monday and dispatch equalizing miles for all drivers by the end of the week.

In the fall of 1986 during a drivers' meeting Carey said the drivers were doing a good job and deserved a raise. The drivers got a \$1-an-hour increase on unloading time and 1 cent a mile but Carey eliminated any off-duty hour pay. At first Allen thought the increases were good, but when he figured it out the increases came to \$1500 a year but the loss of off-duty pay was \$3000. Allen met with Jake Allen and Lewis. The three agreed that the so-called raise was in fact a reduction and decided to talk to management. Jake and Lewis told Allen to do the talking. Allen told Morialli, "Look, you all say that we can't come in here raising Cain, but the law says we can go to the Union anytime we want to. Unless this is straight, that's where we're headed to." Morialli called Plant Manager Sutch. Sutch told Morialli to carry the drivers to Carey at the corporate offices. All four went to Carey's office and Allen explained the loss of pay since the so-called raise. After a discussion Carey restored the off-duty pay which resulted in a good pay raise.

In 1987 a drivers' meeting was held in the conference room. All the drivers, Sutch, Morialli, and Spud Sammons, attended. Sutch opened the meeting by announcing that all

drivers would thereafter be dispatched on equal mileage. Allen spoke up saying, "George, that's not fair. You think you've got us split up, that we can't organize or do anything about it but we're going to fight you now." Sutch responded, "I don't think I've got you split up, I know I've got you split up." Allen did not say much after Sutch spoke. Several of the drivers were irritated and also spoke up, but Allen could not recall what they said. After the meeting the older drivers, Danny Lewis, Jake Allen, Ronnie Nichols, Steve Webb, Jimmy Tice, and Allen, discussed the situation. Allen suggested that all drivers meet with Burriss who had been a fair man in the past. The older drivers told Morialli they wanted to talk to Burriss. Morialli said he would set it up. A week later Morialli individually told each of the older drivers that Carey said they had to go through him to get to Burriss. The drivers never met with Burriss.

In November 1987, Allen called Carey to set up a meeting. They met and Allen said there is a problem. The dispatch is not fair. Carey asked, why? Allen said drivers are not running equal miles. Some drivers are running high on miles and then sitting at home for 3 or 4 days while the other guys catch up with them. When you look at the total miles it appears to be equal. Carey called Sammons, the dispatcher, and Morialli, the supervisor, to the office. All four discussed the dispatch system for some period of time and Carey told Sammons to return to work. Carey then told Allen and Morialli, "You-all got a personality problem. You-all can straighten it out or I will straighten it out." As Morialli and Allen were leaving the office, Carey said to Allen, "I'll be back with you in couple of weeks after I check with the drivers and see what they think about the dispatching."

About 2 weeks later Carey called Allen to his office. Carey told Allen he had checked with a majority of the drivers and they think the dispatch is fair. Allen stated, "The majority you checked with, George, was the bottom six drivers. You didn't talk to not one older driver. You talked to the bottom six drivers." Carey said, "Well, the older guys are not running dispatch anymore. You get back up there and keep your mouth shut." Allen told Carey, "George, I tell you what, if you'll just treat me halfway right from now on, you won't hear nothing else out of me. You done proved you're not going to treat me right, but if you treat me halfway right, you won't hear nothing else out of me." Allen stated that over the years at the drivers' meetings he did most of the talking. Although on occasions other drivers would also speak up. Allen told the other drivers he was looking for another job, and they needed to start speaking up because when he was gone they were going to have to speak for themselves. Allen told the other drivers that he was going to be quiet around the facility. He thought that by being quiet things might go smoother but they didn't.

On several occasions in mid-1988 Allen spoke to Morialli about the propriety of having a union. Most of the time Morialli did not respond to Allen, however, on one occasion Morialli agreed saying, "Just between me and you I think you do to." The union conversations usually occurred in the drivers' room.

In October 1988, all drivers attended a meeting with Sutch and Morialli in the drivers' room. Clem Clark was introduced to the drivers. Clark explained that his job was to improve the relationship between employees and management. He discussed employees and management working together

and illustrated the theme by using Xs and Ys on the bulletin board. As a result of the X and Y testing by Clark, Allen's group won. McClure told Allen, "That's why it is. You're always looking out for yourself." McClure and Allen had wagered on the outcome of the test.

The following month, November 1988, another meeting of all drivers, management, and Clark was held. As the drivers came into the meeting room, they were split into two groups. One group was to list complaints and the other group was to list improvements. Allen was in the improvement group. Clark instructed the groups to turn in their list. The improvement group did not list anything. The complaint group listed dispatch and truck assignments. The dispatch was not equally distributing the miles among the drivers. The truck assignments were not permanent. If a driver's truck was on the yard not being used, another driver would be assigned the truck to make a run. A situation known to drivers as "slip seating." Sutch spoke up and said there will be no more slip seating. If a driver is off, his truck will sit on the yard unless there is an emergency of extra runs needed. In that emergency the double teams will be split up and the idle truck will be used for one of the extra runs. The meeting adjourned. For the better part of a month, there was no slip seating, but it did start again.

In December 1988 Allen made a trip to Knoxville, Tennessee. While driving he spoke on the CB radio with Steve Webb, another driver. Allen asked Webb if he would accompany Allen to see management about the dispatch and truck assignment problems. Webb told Allen he would go with him but his religious beliefs would not allow him to say much, but he would go for support. Allen and Webb intended to talk to the other drivers so all could get together to talk to management. Allen and Webb also discussed the new trucks due to arrive soon and who should get the new trucks. Allen told Webb that he thought there was a grudge between him and Carey. Carey was picking on Allen and all had to suffer.

On December 16, 1988, Allen made a run to Nashville, Tennessee, and talked to Larry Burchette on the CB radio. The two talked about the dispatch for the following week. Allen asked Burchette if he thought the dispatch was fair and Burchette said, "No." Allen told Burchette, "when I get back, I'm going to go see management about it. They're not dispatching by equal miles like he's supposed to be." Burchette said, "while you're in there, see if you can get them to change dispatch back to a seniority dispatch the first of the week." Allen said he would do that. Allen did not ask Burchette to go with him to see management. When Allen got back to the plant he went to see Morialli. Allen testified:

A. I went into Morialli's office and asked him, I said "I need to talk to you." He said, "About what?" I said, "The way you're dispatching. You're dispatching unfair and you're showing favoritism to the bottom of the board." He said, "You're a liar." I said, "No, I'm not. I can prove it." I said, "It's right here in black and white." He said, "You're a liar." I said, "Well, let's go talk to George about it. Ain't no need in me talking to you. I can't talk to you." So, we went to see George.

. . . .

A. I walked on up front and asked the receptionist where George was. She said, "I don't know. I'll page him." She paged George and George answered the page and she said, "George is back in Morialli's office. If you want to see him, come back there." I started out of there, up through the hall in the break room, and there was a window in the break room where you could see all the way down the hall toward Moe's office. George was headed up toward the front. So, I said, "Well, I'll wait on him." I was waiting in the cafeteria there. He never did show up, so I went back up front. I figured he might come around the side. He never did. About 15 minutes or so, and I never did see him, and I started to leave the plant and got in the yard and got to my truck, and I thought, "Maybe he's got up there." So, I turned around and walked back. When I walked back, he was in the office talking to Don Mooney. When he got through talking to Don Mooney, he got up to get his coat to leave out of the office, and I said, "Wait a minute. I need to talk to you." He said, "All right," and Morialli was outside then. We walked in his office, and I said, "George, when are you going to quit screwing with us for something we done four or five years ago?" He said, "What do you mean?" I said, "The way you're assigning runs, the way you're favoring the bottom of the board and assigning trucks." I said, "You-all are going to keep on that you-all are going to mess around and fool with somebody one of these days and you're going to piss them off and they're going to come in here and it's going to be worse than the McDonald's deal out yonder. They're going to wind up killing all of us."<sup>3</sup>

Q. Do you recall anything else said there?

A. Moe Morialli looked at me and he said, "You're going to keep on till you piss me off." I said, "Moe, I don't care about you getting pissed off. I've been pissed off six months about the way things are going." I said, "The best thing for me to do is get up and get my coat before I wind up getting mad and say something that I'll regret and wind up getting fired." I started to get up and George pointed his finger and said, "Sit back down. We're going to talk about this." I sat back down and I said, "Moe, you're saying it's not fair for us to pick our runs, yet you're sitting here and the teams are picking their runs the first of the week." He said, "You're a damn lie." I said, "Joe McClure said they picked their run the first of the week." He said, "Joe McClure is a damn lie and if you keep on, you're going to piss me off." I said, "I can't talk to you-all." I sat there a minute and I asked about—I said, "You-all said that we wasn't going to—you wasn't going to do no more slip seating. In the last meeting we had there wouldn't be no more slip seating. Now, you've got four or five runs next week and you've got a bunch of drivers off and you're splitting up your teams and they're running 1,500-mile trips and we're running 400-mile trips."

Q. We? Who was "we"?

<sup>3</sup> The reference to McDonald's relates to the shooting at a McDonald's in California which resulted in several deaths at the hands of a lone gunman.

A. The rest of the older drivers, what was left. George said, "Moe, why are you doing that?" He said, "To give them more miles." I said, "Well, if you want to give them more miles, why didn't you put them on the run I just been on? They been sitting at home since Wednesday." He said, "Because I want to and if you keep on, you're going to piss me off." I said, "The best thing for me to do is get up and get out of here before I wind up saying something and I'll regret it and I'll kick your ass and I'll get fired."

Q. Do you recall saying anything else?

A. I told George Sutch, I said, "George, I think you are a fair man I appreciate you listening to me. It ain't done a bit of good. If you can't see what went on here, if you can't see this, then you don't want to see nothing. But, I appreciate your time of listening to me." I walked out the door.

Allen denied saying Morialli, "was sorry" or calling Morialli a "mother f—king liar." Allen also denied telling Morialli he would "whip his ass like a stepchild."

Later that afternoon Morialli called Allen at home to inform him there would be no Nashville run on Monday but rather he should report to the office at 9 a.m.

The morning of December 19 Allen arrived at 8:30 a.m. He checked in with Morialli who called Sutch to report Allen's presence. The two went to Sutch's office. Allen testified:

A. I walked in George's office and he was standing behind his desk and he said, "Today is the day." I said, "For what?" He said, "I fired you." I said, "You're kidding." He said, "No. You're terminated as of now." I said, "On what grounds?" He said, "Threats to fellow employees." I said, "I didn't threaten nobody." He said, "You threatened Moe." I said, "No, I didn't. I didn't threaten Moe. I had to get out of here before I did." He said, "It don't matter. You're fired anyway." He said, "Have you got anything to get out of your truck?" I said, "Yeah, but what about my doctor bills? I've already been to the doctor one Saturday, and what about my doctor bills?" He said, "You'll have to take it up with the corporate office. I ain't got nothing to do with that." I said, "What about my safety bonus?" He said, "We're going to pay that to you but you don't deserve it." Then he said, "Have you got anything to get out of the truck?" I said, "Yeah, I got to get my personal stuff out." And him and Moe walked me to the truck. On the way to the truck, I said, "right here at Xmas time you fire me." He said, "Yeah, it's a bad time for all of us." I went out to the truck and got my stuff out of the truck, put it in my bag, turned around and looked at Moe—Walter Morialli and George Sutch and said, "I'll see you in court."

Allen recalled that about 8 months before he was fired Joe McClure was in the vicinity of the dispatch office. Sammons, the dispatcher, said something to McClure. McClure stated to Sammons, "I'm tired of your smart-ass mouth. If you open it one more f—king time, I'm going to shut it for you." Allen could not recall any particulars of an oral encounter between him and W. G. Pierce which occurred a long time ago. Allen did deny that he ever threatened to fight or simply

threatened another employee or a supervisor. Allen recalled hearing that other drivers were upset because the Company was using Pierce to test truck fuel mileages and he was getting better mileage than most drivers had achieved. Allen stated that it had nothing to do with him because he always had top mileage.

On cross-examination, Allen admitted that in years past he used various drugs to extend his driving capabilities, even to the extent of violating DOT regulations. In recent years however, he has not had any need for using drugs of any kind.

Allen owns two large caliber deer rifles and a 357 magnum handgun. The handgun he has only fired once. During past deer seasons, Allen has transported a .22 caliber rifle in his pickup to the company parking lot as have many other employees. Allen and the others stopped the practice before 1988 due to thefts of the guns from the company parking lot.

Allen admitted that he was convicted of assault and battery and fined \$25 several years ago.

Allen stated that his motivation for the December 16 meeting was the effect of the dispatch on the senior drivers. He was upset by what was happening to the group. His complaint of his mileage was not about the week of December 16 but the following week as shown by the posted schedule. Allen uses "mother f—ker" frequently but denies using "mother f—ker and asshole" to Morialli on December 16. Admittedly he used "f—k" although he was no more upset than usual. Morialli was the only supervisor to whom he said, "If I don't get out of here I'm going to have to kick your ass and might get fired." Allen denied that Sutch told him to calm down in the December 16 meeting. The meeting was held in a conversational tone with no one mad.

Allen was surprised when he was fired on December 19. He had a perfect record and did not think there was any chance he would be terminated. Allen thought no more than a warning for his conduct. If he knew he would be fired for what he had to say, he would not have gone in. After his discharge he did not tell any other drivers what happened. Allen did on one occasion overhear one driver tell another that Morialli said Allen threatened to kill people. Allen told the driver, "that's not so."

Walter Morialli has been employed by Respondent for 9 years with the last 7 years as transportation supervisor and director of transportation safety. He supervises 10 drivers, 3 truck mechanics, and 3 yard employees that spot and wash trailers. Morialli's responsibilities include the DOT records and drivers files and daily accumulations of trip information. Morialli has the authority to hire and fire employees and has in the past exercised such authority.

Morialli participated in the events leading to Allen's discharge beginning with the meeting of December 16, 1988, in Sutch's office. Morialli testified:

A. I'm going to say it was approximately around 1:30. I was sitting in my office figuring out the schedule for the next week, and I saw Richard coming up the sidewalk—actually, it's a ramp for forklifts—coming in off a run. There was another driver in the same proximity of him, Larry Burchett. Richard walked in and said, "I need to see you." I said, "Well, come on in."

Q. Well, let me ask you this: What did he complain about? What was he complaining about?

A. Okay. At that time he told me that he was getting f—ked on his runs.

Q. Did he say why?

A. He mentioned something about double teams getting shown favoritism, possibly something—if I recall correctly, he'd had to make three runs that week. And at that time I showed him the schedule for the upcoming week, and offered to show him the mileage chart. He said, "I can see I'm not going to get any place with you." I said, "Well, would you like to talk to George?" And he said "yes—" I got up from my desk and walked over and I told George, I said, "George, Richard is here and he'd like to see you. He's upset about his mileage and some other stuff." I didn't go into—I just basically told George mileage. George says, "No problem. I'm busy right this minute. Tell him I'll be up front as soon as I can." I even paged up front to try to get Richard to answer the page to let him know that I had made arrangements for him to see George. Nobody picked up the page. I walked up to the front office. When I walked up to the front office, I saw Richard standing in the hallway talking to somebody. I don't remember who it was. I walked on up front and took care of what I went up there for. Walked back to my office again. George Sutch paged me. He said, "Why don't you get your stuff together and come on up. Pick Richard up with you on your way." Richard was in the break room. I think he was talking to Gene Harris. I said, "Richard, come on. George is ready to see us." We went in the office and sat down and Richard closed the door, and started stating his gripes that he had. I don't remember which one he stated first.

A. What's the best you recall of what he said? You say you don't remember what he said first?

Q. I don't remember his first statement. He told George he was getting f—ked around. I had a summarization of the mileage. I had a couple of three or four weekly trip sheets. One thing that sticks out in my mind, he made a issue that a double driver had taken like a four or five-hundred mile run, like a Nashville, Tennessee run on a Monday. He didn't think that was right. I pointed out that it was a slow week. For that double team to equal the miles he would get, they'd have to run over 4,000 miles. They were able to pull that short run and come right back in and drop one trailer and hook up to another one and go on, say, approximately a 1,500-mile run. That was my explanation.

Q. Did George—say anything in response to your explanation?

A. George Sutch thought it was the right thing to do, that it was done properly. Richard didn't seem to—it didn't seem to please him any that I did it that way. In regards to his getting f—ked around on miles, I pointed out the fact to him that he was the No. 2 man on miles for the new fiscal year which started up October 1. I also pointed out that he had run approximately 2,300 miles that week. In the middle of December is our very slow season. I probably had two drivers off on vacation deer hunting at the time. I had basically offered vacation time to anybody that wanted it that still had vacation time left. It didn't seem to matter to him

that he had run 2,300 miles and that he was No. 2 man on miles. That's when he brought up the fact that I was f—king him around because I was letting—I believe Paul Crestman—I was arranging it so he could be home and off on weekends. I told Richard that I was not doing that, that if he happened to be home on weekends, it just fell that way. Our drivers are normally home on weekends anyway. Sometimes they might not get in until Saturday morning, possibly Saturday afternoon.

Q. This is what you told him?

A. Correct.

Q. Did he say anything in response to that?

A. Nothing I said—he would call me liar. He shoved my paperwork back. He accused me—He said, “The only thing you show George is what you want George to see.” He made the statement that when George had dispatched while I was on vacation, it was done right. When I dispatched, I was f—king him around. And I don't have but one set of papers and the mileage sheet stays on my desk at all times. The weekly schedule is public knowledge. It's posted at least three places in the plant. From that point on, things got to where “You're a liar. I'm going to whip your mother f—king ass. Shut up, boy. I'm talking.” After the third time.

Q. (Interposing) Third time of what?

A. Threatening to whip my ass like a mother f—king stepchild, I did make the statement “That might not necessarily be so, but that's not what we're here for.”

Q. Did he use the word “mother f—ker” any more than one time?

A. Yes.

Q. How did he use the word?

A. He either called me a mother f—king liar or a lying mother f—ker. One of the two. I don't remember per se which.

Q. After you made your statement about “That may not necessarily be so, but that's not what we're here for,” or something to that effect, what happened from that point?

A. After that—Shortly after that is when he made the statement about the McDonald's style killing. He said, “If management don't quit f—king me around—upper management don't quit f—king me around, there's going to be a McDonald's style killing. There's going to be dead bodies laying everywhere.” He made the statement in the front office. He stood up. That's when I told him I was really and truly sorry he felt the way he felt.

Following the meeting with Sutch on December 16 Morialli recommended to Sutch that Allen be terminated. Allen was subsequently discharged. Morialli testified to the reason for Allen's discharge:

A. Mr. Allen was discharged for threatening to whip my ass like a mother f—king stepchild, calling me a liar. He threatened to whip my ass like a mother f—king stepchild at least three times. He also made a statement that if management didn't quit f—king him around that front office would look like the McDonald's killing that happened in, I believe, San Diego, California.

Q. Is that it? That's the reason he was fired?

A. Well, there was—you want to know the reasons he was fired. That's primarily—insubordination and direct threats to a supervisor is the reason he was terminated.

Q. The insubordination was what?

A. Insubordination is when George Sutch asked him on several different occasions to calm down and quit making threats and let's talk about the issue at hand.

Q. That was the insubordination?

A. That's what the insubordination at that particular—at this time, yes.

Q. When you say “this time,” what do you mean?

A. I mean at the confrontation on the 16th. That's the insubordination I'm talking about right now.

Q. Well, was there other acts of insubordination on the 16th?

A. On the 16th, no.

Q. And the threats to supervisor?

A. Threat to myself. Directly that he would whip my ass. The second threat, the mass killing. He made the statement there would be dead bodies laying all over the front office.

Q. Dead bodies would be laying all over the front office? That's what he said?

A. Yes, sir.

Q. And he said that if management did not change their ways toward him?

A. He said if management didn't quit f—king him around.

Q. Did Mr. Allen make any other comments to you or directed at you or about you during the conversation on December 16th?

A. Yes.

Q. Okay. What were the other comments?

A. At one time during the conversation after he had threatened to whip my ass at least twice, he told me to “Shut up, boy,” on numerous occasions, “I'll slap the piss out of you.” At this stage of the game, I was beginning to get a little concerned, and I just basically rearranged myself in my seat. Mr. Allen was sitting on the edge of his chair and he made motions with his hands. He said, “Come on. Come on. Hit me. I want you to hit me. I'll get you fired.” I told him, I said, “Richard, that's not going to happen.”

Q. Did Mr. Allen stand up when he did that?

A. He didn't stand up. He moved closer to the edge of his chair and made motions with his hands.

Q. Did Mr. Allen make any more statements or comments to you, or about you during this conversation?

A. He called me a liar, threatened to whip my ass like a mother f—king stepchild. He said we should go across the road. Once again, he threatened a McDonald's style killing, mass killing. And towards the end of the conversation, I told Mr. Allen, I said, “Richard, I'm really and truly sorry you feel this way.” At this time he had stood up. He was leaving. As he left, he said, “You're sorry, all right.” And that was the end of the conversation.

Q. Did you ever point out to Mr. Allen when he was threatening you that perhaps he couldn't carry out that threat?

A. At one time after about the third time he told me he was going to whip my ass, I said, "It might not necessarily be that way, but that's not what we're here for."

Q. How many times did Mr. Allen make the McDonald's threat in the meeting?

A. One time.

Q. Mr. Allen is not the only driver who's complained about the run assignments or mileage out there, is he?

A. Repeat that question. I'm hard of hearing.

Q. All right. Mr. Allen is not the only driver at the company who made complaints about their runs or their mileage and so forth, is that correct?

A. No.

Q. Not correct?

A. Other drivers have complained about runs.

Q. That has been, from time to time, sort of an on-going dispute with the drivers, isn't it?

A. From time to time, yes.

Q. Particularly since—you can answer this better than I can—particularly since the company has gone to this system of trying to have equal mileage for all drivers, regardless of seniority?

A. The topic would come up from time to time after we went to equal miles, yes.

Following the meeting and after Allen had left, Sutch asked Morialli what he thought. Morialli told Sutch that Allen should be terminated. Sutch told Morialli, "I basically agree with you." Morialli did not call the plant security guards or alert them in any way that Allen had made threatening remarks.

Morialli did call Allen that afternoon at home and told him to come to the office on Monday at 9 a.m. Allen came in Monday and met with Sutch and Morialli. Sutch told Allen he was discharged. Allen said he had been set up and would see them in court.

Later that day Morialli was told by Stauffer to write a memo of what occurred in the meeting with Allen and Sutch. Morialli did so but the memo did not mention, "whip your ass like a stepchild" or "mother f—king stepchild."

Morialli in additional testimony stated he did not call Allen a liar in the December 16 meeting. He stated that Allen's reference to McDonald's came at the last of the meeting. During the meeting Morialli spoke in a normal tone without anger; however, Allen spoke in a loud tone and was angry. After Allen left the meeting Sutch and Morialli spent some 3–5 minutes together. During this time Morialli felt that Allen was capable of carrying out his threat based on Morialli's knowledge of past threats made by Allen. Morialli stated that he felt Allen was capable of hitting him or maybe even killing him, albeit Morialli did not really think Allen could "whip his ass." During the December 16 meeting with Allen, when Allen stated he would whip Morialli's "ass," Morialli told Allen, "that's not necessarily so."

The past threats by Allen considered by Morialli involved W. G. Pierce, a county constable, and mechanic Mike Likes. The constable incident resulted in a physical assault charge against Allen which Morialli was aware of. The Likes incident resulted from a dispute over a truck repair or a failure to repair a truck several years ago. Morialli heard that Allen threatened to whip Likes, but an investigation failed to con-

firm anything. Morialli recalled that the Pierce incident occurred in 1986. Pierce was assigned various trucks to drive so fuel consumption could be checked by the company. Pierce was a good driver and always saved fuel no matter which truck he drove. In effect Pierce made some drivers look bad on fuel consumption. Morialli heard that Allen threatened to take Pierce "across the street." Morialli investigated the incident. Allen denied making any threat to Pierce. A witness to the incident, James, did not confirm that a threat was made or that a threat was not made. Morialli told Pierce and Allen, "Why don't you-all just try, if you've got personal problems, try and settle them and be friends."

Morialli also recalled that Allen, in 1985 or 1986, was talking with he and Sammons. Allen remarked that he was too old to fight and if anybody ever backed him into a corner, he would just shoot them. Morialli knew Allen owned several guns and had brought one into the facility. Allen showed a handgun to Morialli in the office at some point in time when Morialli had an interest in purchasing such a handgun. Morialli knew also that other employees owned firearms. He himself owns 20 guns including large and small bore handguns.

*George Sutch* testified he has been plant manager of Alpha Resins Tennessee since 1982 having begun employment in the California Resin plant in 1978. As plant manager he directed the operations of a production department a maintenance department and a transportation department and has ultimate authority to hire and fire employees. Pursuant to his authority he participated in the discharge of Richard Allen. The incident leading to the discharge occurred Friday, December 16, 1988, and the discharge occurred Monday, December 19. Although Sutch has authority to discharge employees he had direct orders from George Carey not to severely discipline truckdrivers without his expressed consent and knowledge. Carey gave Sutch the order sometime after the union campaign among drivers was concluded in 1983. There is a disciplinary policy at the facility but it is not written. It's basically a three-step procedure: oral interview with the employee explaining the infraction, a writeup explaining the infraction, and recorded in the employee's personnel file and if repeated the employee could receive a further writeup or be discharged. The number of steps in a particular case is determined by the severity of the infraction. This disciplinary policy is supported by a number of plant rules which although not announced to or disseminated among employees when hired, should be understood by all employees going into a place of business. Sutch believes people have a clear understanding when they go into a place of business, there are certain things they can do and certain things they can't do.

Allen had more than 10 years' seniority and was one of the three most senior drivers. There has been an ongoing dispute among the most senior and less senior drivers about how the runs should be dispatched. For several years the drivers were allowed to choose their runs based on seniority but in November 1987 the dispatch was changed to an equitable distribution of mileage among all drivers. Most drivers drive by themselves but there are double teams for long runs. All drivers have the option to double team, but none of the senior drivers ever exercise the option. Generally the less senior drivers must be assigned to the double teams. The double team was designed for long distance runs so the vehi-

cle could drive more continuously than it could with a single driver. The double teams would split the pay for the run. On occasion only one long run was available so the double team would also be dispatched on short runs to equalize mileage among all drivers.

With regard to the program instituted in 1988 and taught by Clem Clark Sutch testified:

The purpose of the meeting was to establish a communication link between management and employees, to gain an open channel to them so we could understand some of the things they wanted and some of the things we wanted to do, have them do, to solve any problems that they had, how to deal with situations with customers, if they were angry or whatever. But, the bottom line of the whole exercise was to have a more smoother running plant where we wouldn't have problems or if we did have problems, we would be able to resolve them in an expeditious manner.

On December 16, 1988, Sutch met with Moe Morialli and Richard Allen. Allen was complaining that double team drivers were getting preferred assignments so they could be home on weekends and also compile good mileage whereas he was getting less mileage. Allen also had general complaints about the system operation.

The meeting started when Morialli came to Sutch's office with Allen. Sutch testified:

A. Moe told me that Richard wanted to have a conversation and I went to my office and contacted Moe and asked him to bring Richard to the office. Richard came in and asked if he could close the door. I said, "Go ahead and close the door. That's fine." He sat down and the first thing that he said was, "I'm being f—ked. I've kept my mouth shut for 11 months or 12 months, and I'm not going to take any more shit." And I said, "What do you mean? What's your problem?" And he said that he was getting f—ked on mileage, that he was not getting the miles that he wants to get or he needs to get. And I turned to Moe and I asked Moe, "Have you got your mileage sheets with you?" And he said he did. I said, "Well, let's see what the mileage numbers are." And he went to put the papers in front of Richard and Richard reached out and pushed the papers aside and said, "You're a lying mother f—ker. Whatever's on those papers are wrong."

Q. And Mr. Morialli hadn't said anything yet in the conversation?

A. Other than to present, "Yes, here are the numbers and let me show you where you stand. You're the number two man on miles right now. I don't understand what you're complaining about."

Q. Now, do you recall if he did say that before Mr. Allen made his statement about him being a liar?

A. As I said, this is to the best of my recollection. He called him a lying mother f—ker for some reason.

Q. By Mr. Ford: Do you recall—Well, I'll ask it like this: Do you recall Mr. Morialli saying anything directly to Mr. Allen before Mr. Allen called him a liar, a lying mother f—ker?

A. Just to greet him, say "Hello, Richard. Come on in. Sit down. Let me show you the numbers," and as

soon as the "number" word came up, as I recollect, he said, "You're a lying mother f—ker. Those numbers aren't right."

Q. And that's the first time that Mr. Allen called.

A. (Interposing) That he called him a lying mother f—ker?

Q. Yes.

A. Yes.

Q. Had Mr. Allen made any other bad statements—had he threatened Mr. Morialli before he called him a lying mother f—ker?

A. I don't recall.

Q. You don't recall? When do you recall Mr. Allen first threatening Mr. Morialli?

A. When?

Q. Yes, sir, when in the conversation.

A. When he initially showed Richard the numbers, mileage sheets that recapped where Richard stood on mileage, as I said, he immediately pushed that aside, the numbers aside, the paperwork aside, and called him a lying mother f—ker.

Q. But when did he threaten physical violence against Mr. Morialli?

A. Further into the conversation.

Q. How many times did he threaten to whip Mr. Morialli's ass?

A. At least three times.

Q. At least three times. How long was the conversation?

A. I believe it was about 15 to 30 minutes.

Q. Did you take the opportunity to advise Mr. Allen or admonish Mr. Allen that his conduct either was breaking a company rule or was close to breaking a company rule and he could be subject to discipline?

A. I told Richard each time that he said a statement such as that when he made a direct accusation or told him that he was going to whip his ass, I said, "Calm down, Richard." But Richard completely ignored that.

Q. So, you did not admonish Mr. Allen that "You're breaking a rule here," or "You're close to breaking a company rule?"

A. No, I did not.

Q. And, "You will be subject to discipline?"

A. No, I did not.

Q. How many times did he, Mr. Allen, call Mr. Morialli a lying mother f—ker?

A. Three or more times.

Q. Do you remember how many more than three?

A. No, I do not.

Q. You definitely remember three?

A. I don't definitely remember it, but I'd say at least three times.

Q. How did the California statement come up, the McDonald's in California statement come up?

A. He had gone—We had gone through all the items that he had complained about, how he was being screwed on mileage, demonstrated to him with numbers that that wasn't true. We had demonstrated to him with an explanation of how a double team was dispatched and why it was dispatched, and he was—he was unconvinced, and repeatedly threatened to whip his ass. And I said, "Richard, there's nothing wrong with it. You're



not being picked upon," as he had claimed. And at that point in time, Richard said that "If this company doesn't stop f—king with me, there's going to be dead bodies laying everywhere just like McDonald's in Southern California. Dead bodies everywhere."

Q. Did he repeat that statement more than once?

A. He repeated "dead bodies everywhere" twice.

Q. What about "McDonald's in California," did he repeat that more than once?

A. Not to my knowledge.

Q. Did you testify that you felt that Mr. Allen had threatened you and other office employees?

A. Are you asking me that when he threatened to kill the front office staff and turn it into dead bodies everywhere type situation?

Q. That's what you said. You said he threatened to kill the front office staff.

A. He said—He threatened to turn the front office staff and management—the management of this company—into something that looks like McDonald's in Southern California with dead bodies everywhere. And I included myself in the management and the office staff, yes."

Sutch's response to Allen's McDonald's statement was, "there's nothing we can do to resolve your problem. I don't know what your real problem is."

After Allen left the meeting Sutch asked Morialli, "What do you think of this conversation." They talked for a few minutes and concluded that they thought Allen should be terminated. Sutch stated he had decided that Allen had to be discharged for two reasons: (1) the repeated threat to whip his supervisor's "ass," and (2) the threat to kill people in the front office as at a McDonald's restaurant, coupled with dead bodies laying everywhere. Notwithstanding the nature of the threats Sutch did not know where or what Allen did when he left the meeting. Sutch assumed Allen went home about 2:30 p.m. Sutch did not alert security or call the police about Allen's threats.

In additional testimony of the December 16 meeting with Allen, Sutch stated that Morialli did not call Allen a liar. Morialli spoke during the meeting in a civil tongue whereas Allen was angry and spoke loudly. Allen's reference to McDonald's was broached in the latter part of the exchange. Sutch stated he took Allen's McDonald's statement seriously because it was said in a threatening manner and Allen was dead earnest. Allen's tone was angry but he spoke calmly and very serious. Allen also complimented Sutch as a fair minded person. Sutch did not lock his or any other door. He did not escort Allen from the premises or alert the security guards. He did not ask Morialli if he wanted protection nor did he notify the local police of Allen's statement.

Sutch expanded on the December 19 meeting with Allen. Sutch at the outset read the discharge slip to Allen. The stated reason for termination was gross insubordination and threats to fellow employees. Sutch also told Allen the termination was based on actions and things said by Allen at the December 16 meeting. Sutch denied stating to Allen, "today is the day I'm going to fire you." Following the termination Sutch and Morialli escorted Allen through the plant and to his personal vehicle. Sutch told security that Allen was terminated and to call police if they saw him again.

Sutch lacked authority to discipline drivers so he called Carey, but he was out of the office. Sutch then called Stauffer telling him that there had been a confrontation with Allen and he wanted to talk about it. Sutch reported to Stauffer that Allen had threatened his supervisor, used highly abusive language in doing so, and threatened to kill people in the front office and management. Sutch reported Allen using "mother f—ker," "liar," and words to that effect. Following the report Sutch and Stauffer agreed that Allen should be discharged but not that day. It was suggested that Morialli should contact Allen telling him to come to the office Monday morning when he reports for work. Allen would at that time be discharged. Sutch stated that Morialli was instructed to have a police presence on Monday morning when Allen came to work. Morialli did talk to Allen that day about 4:30 p.m. No one notified the plant security of Allen's threats nor were the guards alerted to Allen's requested presence on Monday.

Sutch acknowledged that he and Morialli prepared memos of the encounter with Allen at Stauffer's request following the management decision to discharge Allen. His memo does not contain any statement by Allen threatening to kill the front office staff and the management of the company. Neither does his statement contain any use of the phrase, "lying mother f—ker" by Allen to Morialli. Further, Sutch's memo made no mention of "whip him like a stepchild" or "to come go across the street."

Sutch knows that employees in the plant have, among themselves and to supervisors, made statements such as, "I'll get your butt" or "I'll kick your ass" and other similar colloquialisms or vulgarities. If reported they are investigated. In such instances the employees have not been disciplined. Sutch was not aware of the frequency of such statements, but he acknowledged that it was the regular course of business to have profanity on occasion. He could not recall any specific instance involving an employee and a supervisor or between employees which were investigated. Any threat by one employee to another is a violation of the work rules but also is difficult to investigate. Sutch stated that the threat to Morialli by Allen was the first time he had witnessed such a threat.

Jeffy Stauffer testified he has been employed by Respondent for 11 years as general counsel of the corporation and has been vice president for 6 years. As vice president he has oversight responsibility for personnel matters and employee relations at several different corporate subsidiaries. George Carey, vice president of operations, requires that all drivers' discipline involve him. Generally, Stauffer is involved in the discipline of all other employees. There are roughly 12 drivers and 300 other employees at the facility. The facility is supervised by a plant manager, sales manager, and a tech service manager. The company policy is to supervise with a three-part management team. George Sutch is the plant manager at Alpha Resins and he enjoys considerable authority with respect to the daily operations and control of the work force. Walter Morialli supervises the drivers at the facility. Stauffer, Sutch, and Morialli conferred about Richard Allen's conduct on Friday, December 16, and the consensus was to discharge Allen. Sutch had requested that Stauffer join in the consideration of Allen's discipline. Carey was out of town so Stauffer elected to join the plant management in the meeting. In addition, Stauffer had Bonnie Long present to process any

personnel paper requirements. Stauffer stated that Allen was discharged for cursing his supervisor, for threatening to whip his supervisor several times, and threatening to make the facility look like McDonald's if things were not changed to his satisfaction. Stauffer had no firsthand knowledge of Allen's December 16 statements but all had been reported to him by Sutch and Morialli. Stauffer stated that Allen would have been terminated even in the absence of any reference to the McDonald's tragedy. Stauffer also stated that the cursing and threat to whip his supervisor were individually not sufficient to cause Allen's discharge. Stauffer added that only if the threats to whip a supervisor and kill the front office people were in "earnest" could they result in discharge. Stauffer's conclusions about Allen's conduct were drawn from the demeanor of Sutch and Morialli as they reported the incidents to him. Sutch looked a little shocked and Morialli was agitated and upset. Sutch reported that Allen called Morialli a "lying mother f—ker" and threatened to whip Morialli physically more than once. Allen also made a comment that he would make the place look like McDonald's. Sutch stated that Allen was upset throughout the meeting with him and Morialli.

Morialli reported to Stauffer that Allen had returned from a run and the two got into a discussion. Allen was angry and Morialli felt he could not handle the situation. Allen said he was tired of getting "f—ked" and insisted on seeing Sutch. Morialli asked Sutch to join them. The three discussed Allen's complaint and during the discussion the alleged threats and cursing accrued. Although Morialli told Stauffer that he took Allen seriously when Allen threatened to whip him, he did reply to Allen, "I don't think that's necessarily so." The three continued the discussion following the alleged threats and the cursing and finally Morialli told Allen, "I'm sorry about this." Allen then left telling Morialli, "you are sorry."

Following the reports by Sutch and Morialli, Stauffer asked Sutch what would be an appropriate action. Sutch replied, "termination." Stauffer said he agreed. Stauffer stated that Sutch did not need permission to discharge employees, he could have terminated Allen on his own. Stauffer agreed to discharge not because he was very concerned or fearful about Allen's "McDonald's" threat, but because he was concerned enough not to take a chance. Stauffer did not know if Allen would carry out the threat or not but he thought Allen should be terminated and thereby denied access to the facility. He did not ask either Sutch or Morialli if they thought Allen was capable of carrying out the McDonald's threat or the threat to whip Morialli's "ass." The facility is guarded by two contract security people who check employees coming into and leaving the facility. Stauffer did not alert the guards to Allen's threat nor did he alert either of the two local enforcement authorities. He did tell Sutch and Morialli that as a result of the heat of the moment in the December 16 meeting with Allen it would be advisable to inform Allen on Monday morning. Stauffer also suggested that the sheriff's department be asked to have a car in the area on Monday when Allen came in. No one alerted the plant guards for Allen's entrance on Monday nor was any type of escort determined to be necessary on Monday for Allen.

Shortly after the supervisors' report of the December 16 discussion with Allen, Stauffer asked each to make a written report of the events for him.

Stauffer did not personally interview Allen before the discharge nor did he review Allen's personnel record or employment history. Stauffer does not know what discipline system is used at the facility nor how Sutch in the past dealt with employee discipline. Stauffer only once before was involved in a plant discharge, in California several years ago. He did know that the facility in 1988 hired a consultant on employee relations but that was the extent of his knowledge of the situation.

*Charles Stephen Webb* testified he has been a driver for Respondent since 1976. Webb recalled a drivers' meeting in October 1987 with all the drivers, Morialli, Sammons, and Sutch, present. Sutch informed the drivers that the seniority dispatch would be discontinued and the dispatch thereafter would be equal miles. A few drivers spoke up objecting to the change but Webb did not recall any reference to a split among the drivers relative to the dispatch system. After the meeting several drivers discussed the situation and decided to set up a meeting with Burriss. The purpose was to see if a dispatch system based on seniority and some changes that would favor the less senior drivers could be worked out. The equal miles dispatch was very objectionable. The meeting was never held because they learned that they had to meet with Carey instead. Webb learned of the Carey meeting from Morialli. Morialli also told Webb that it would look better on his record if he did not side with Allen. Carey did in fact talk with several drivers individually, but he did not talk with Webb. Webb did not know whether Carey spoke to any of the senior drivers.

Webb attended a driver meeting in the fall of 1988, but he does not recall the month. Most drivers and Sutch and Morialli were present. Clem, a consultant hired to show us how to function better by communications between employees and management, chaired the meeting. He divided the drivers into groups and each group got a piece of paper. Each group selected a member to go outside and discuss the paper among themselves. When the individuals returned to their groups they were asked by Clem to pick an X or Y. The groups alternated until all individuals had participated in the outside discussion. The Xs and Ys were tallied and Allen's group won. A few of the drivers had figured out what was going on and how to play the game. McClure said, "that's why we can't get along with each other." One driver said, "Richard [Allen], you're just out for yourself." Allen replied, "Yes, that's right. I am out just for myself."

There was another meeting of drivers before the end of the year. The same people attended. Clem split the drivers into two groups. One group was instructed to list all things that hindered a driver in his performance. Webb was in this group. The other group was to list all changes made since the first meeting that resulted in improvements. Webb's group listed truck assignments, dispatching, and several other things that hindered performance. The dispatch complaint stemmed from the two-driver teams. Because of the equal mile dispatch the teams did not go out as often as the single drivers. The teams had to take the long runs to build up miles while some single drivers were held back from short runs until the teams caught up with the mileage. The truck assignment problem resulted from the company selling several tractors causing a shortage of tractors. In the past new or better tractors were assigned by seniority but with the shortage, the better tractors with larger sleepers were as-

signed to two-man teams. The driver who lost the better tractor to the two-man team was assigned another tractor. Allen was in the other group and they had not listed any improvements.

Around December 13 or 14, Webb and Allen each had a run to Knoxville, Tennessee. While driving they discussed the dispatch and truck assignments on the CB. Allen wanted one of the newer trucks when the teams were broken up. Sutch had stated previously that he did not think Allen deserved one of the newer trucks. Sutch also stated that the teams had done a good job and a team member should keep the newer truck if drivers went back to singles. Allen said he thought he would not get a new truck because of his conflicts with Carey in the past. Carey said a couple of drivers had not gotten a new truck since they hired on and it was time they too got a new truck. Newer trucks got better fuel mileage so the driver would get a larger fuel bonus. Truck assignments were imminent because during deer season a lot of drivers take vacation. That would leave a lot of trucks idle in the yard unless the teams were broken up and all drivers made single runs.

Webb and Allen also discussed going to see Burriss, but Webb did not want to go. Allen suggested getting a group of drivers to go because the more drivers that go the more impressive it would look. It would not look like just one driver has a complaint. Webb agreed to be part of the group, but he did not want to say anything. Webb preferred silence due to his religious beliefs. He also did not use curse words, but he was aware of vulgarity among the drivers and supervisors.

Webb stated that in 1986, 1987, and 1988 Allen was the most outspoken driver in the meetings. Anything that was not fair to the drivers, Allen would bring up at the meetings. Webb, in the past, has seen several pickups in the company parking lot with rifles in the racks. However, after several thefts, the drivers quit carrying their guns in pickups driven to work.

In 1988 senior drivers in order were: Danny Lewis, Webb, Richard Allen, Ronnie Nichols, and Jake Allen. On occasion Lewis would voice his opinion but Allen spoke up more for the drivers than anyone.

In Webb's opinion Allen was entitled to a new truck because not only was he a senior driver but he had in the past run as many double miles as any other driver. As a senior driver he should get the new truck with better fuel mileage and a higher fuel bonus. Webb himself had not requested a new truck, but in March 1989 he did get one of two new trucks that came in.

On cross-examination Webb stated that he told Allen during a CB radio conversation in December that he thought the senior drivers should get the trucks which are more fuel efficient. Webb recalled that during the period of *seniority dispatch*, fall of 1986 to fall of 1987, the senior drivers got more mileage than the juniors. That's why the juniors favored equal miles dispatch.

The Company began buying new trucks in 1979. Drivers got the new trucks in accord with their seniority. Lewis got the first, Webb got the second, Yeager was in line for the third, but it was a conventional Kenworth and he wanted a cab-over. Yeager passed to wait for a cab-over. Allen got the conventional Kenworth. Thereafter each driver got a new truck when his turn came. Whenever a junior driver sepa-

rated from employment, the drivers could, by seniority, opt to take the truck left unassigned, because it would be newer than those of most senior drivers.

Webb stated that not all drivers complained about the miles attained under the equal miles. Allen did complain about the miles he got and the manner of dispatch.

Webb was aware of the directive to drivers about cursing the dispatcher under threat of discharge. He knew that some drivers had cursed the dispatcher, but he never heard Allen curse Morialli. Webb did hear Allen call Morialli a "gutless wonder."

*Ronald Edward Nickels* testified he has driven for Respondent for 11-1/2 years. He recalled the last drivers' meeting that Allen attended was in November 1988. All the drivers, Sutch, Morialli, and Clem, the consultant, attended. The drivers were divided by subject matter. Half the drivers were to list problems and the other half were to list improvements. Nickels was in the problem half. His group listed dispatch, communications with management, truck assignments, slip-seating, and equal mileage. In the discussions among the group, Nickels said the dispatch should be by seniority because the senior driver should make more money than new hires. Webb was the secretary of the problem group and he wrote down all the problems. After the list was completed, Webb read the list to all present at the meeting. All drivers then discussed the problems listed. During the discussion Webb and Lewis stated that they should get the two new trucks due in soon because they were most senior and all drivers had in the past gotten a new truck. It was time to go back to one and start again. Sutch told Webb and Lewis he would get back to them. Sutch also told the group that slip-seating would stop. Only in an emergency, such as a truck breakdown, would an assigned truck be used by someone else to make a run. Nickels also recalled the drivers' meeting in the fall of 1987. Sutch informed the drivers that the dispatch would no longer be by seniority. Thereafter, dispatch would be by equal mileage. Allen spoke up and said that management thought the drivers were split up. Either Sutch or Carey said they did not think the drivers were split up, they knew the drivers were split up.

Allen spoke up at all the meetings. Allen always spoke about the conditions that drivers have to face. Allen was concerned about himself, but he had the drivers at heart, too. Nickels never spoke up because between Allen and Lewis, all that could be said was already said. It was not unusual for drivers to discuss something among themselves and then Allen would speak up at the meetings informing management of the problem. Allen would usually speak up before Lewis or anyone else. Lewis and the others required more time to ready themselves to engage in any discussion. Most of the senior drivers were dissatisfied with the dispatch and Allen usually told management. One specific incident involved the loss of pay for meal stops. Allen and Lewis went to Carey to complain that the takeaway was a mistake. As a result of the meeting, Carey reinstated pay for meal stops.

Nickels was surprised when Allen was discharged. Allen had a good driving record, never had a wreck, and had never been disciplined. Nickels never knew Allen to instigate a fight. If Allen was in a heated discussion with anybody, before he would fight he would leave the room. He's a lot smarter guy than that.

*Michael Likes* testified he was a mechanic in the truck shop at Respondent's facility. Likes knew Allen and recalled that drivers always talked to Allen about work problems. Just about everything from safety bonuses to fuel bonuses to what driver got what run assigned. Allen was kind of the spokesman for the group, particularly the senior drivers. Likes also recalled that everyday talk in the shop and around the dispatcher was crude. He specifically recalled that McClure was angry because he did not get a certain run one week and McClure told Sammons he would kick his "little wormy ass." McClure was not disciplined for the remark.

Several years ago Likes and another mechanic were in the dispatch office when Allen was discussing a driver problem with Morialli. Allen left the office and Morialli said, "If Richard didn't quit stirring things up, the company was liable to get rid of him." Morialli, as transportation supervisor, on one occasion said if the drivers keep complaining the Company will get rid of the trucks and go to common carriers. This occurred a couple of years before his discharge.

On cross-examination, Likes stated that he and another mechanic were discharged by Sutch for failing to follow established procedure in cleanup. Likes knew the cleanup was wrong and held no ill will toward the Company for his discharge. He stated that in the circumstances he would have done the same thing if he was Sutch.

Likes did not recall any threat from Allen stemming from a truck repair that Likes had performed. Although Likes attended several drivers' meetings as the truck mechanic, he could not recall any incident of drivers cursing Sammons, the dispatcher, and management telling the drivers to tone down and quit abusing Sammons. Likes worked as a mechanic for 6-1/2 years and was terminated about 2 years ago.

*Joe McClure* testified that he is a driver at Respondent's facility and is related to Richard Allen. He is seven on the seniority list. McClure recalled an incident between him and Sammons 3, 4, or 5 years ago in which both used curse words toward each other. McClure could not remember any specifics of the encounter. He did remember that several months later the Company made a rule against cursing the dispatcher.

The Company has always had an open door policy and encouraged drivers to come to them with complaints. In every drivers' meeting, problems were discussed whether they were raised by management or not. McClure has gone to Morialli with a problem and if Morialli couldn't help he went to Sutch and if needed he went to Carey. McClure could not recall any specifics, but he did recall it was a personal matter and not a problem common to other drivers. McClure did not make a habit of complaining about work or what he had to work with.

McClure was not aware of Allen's discharge until Morialli told him what happened. A week or two after the discharge, Larry Burchette told McClure that he had talked with Allen on the CB that Friday while both made a run. Burchette said Allen was upset and he tried to get Allen to wait until he cooled down before going to management.

McClure stated that Allen talked to management more than the other drivers and Allen talked to them a lot. McClure agreed that something was wrong with the dispatch system and that the dispatch should be by seniority, particularly during the slow season.

*Larry Burchette* testified he has driven for Respondent about 7 years. On December 16 he was returning to the facility about the same time as Allen. The two talked on the CB radio about dispatching. Allen said the dispatch was not fair, and he was going to talk to management when he got back. Burchette suggested that Allen not talk to them when he returned but wait until a later date when Allen was not upset. Allen told Burchette he was probably right about waiting.

Burchette was on vacation within the 2-week period after Allen's discharge and does not recall any conversations with Joe McClure about Allen's discharge or the events leading up to it.

#### Analysis and Conclusions

The General Counsel's complaint alleges a discriminatory discharge and, alternatively, a discharge caused by the concerted activity of the employee. The determination of the ultimate fact, in either case, therefore turns on Respondent's motivation. The causality test of *Wright Line*, 251 NLRB 1083 (1980), applies. The test as explicated by the Board is "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

To sustain its burden of proving discrimination, the General Counsel must at least show that Richard Allen engaged in union activity, that Respondent had knowledge of Allen's union activity, that Respondent displayed animus against unions or Allen, and that Respondent's action against Allen was triggered by his union activity.

The record evidence evinces a union election at Respondent's facility in 1983. There is, however, no evidence of any union activity by any employee prior to, during, or after the election. The General Counsel offered only a single statement by Respondent's vice president uttered at the Company's victory party following the election. Albeit Allen was the recipient of the statement, it was not directed at Allen nor did Allen in response declare any union affiliation. In addition to the remoteness of the remark there is simply no substance of individual activity or Respondent's knowledge of any. At the most the General Counsel's offer shows a limited animus toward the Union engaged in the election. Further, there is no evidence of any subsequent union activity by anyone. The General Counsel did offer a quizzical remark by Allen at the start of the December 16 meeting which precipitated the decision to discharge Allen. Notwithstanding the opinionated nature of the remark there was no response nor was any discussion initiated by it. The remark stands alone and is insufficient to support any material fact of union activity requiring proof by the General Counsel. The General Counsel therefore has failed to show a prima facie case of discrimination in the discharge of Richard Allen.

What remains is the complaint allegation of "concerted activity." The General Counsel must prove that Allen was engaged in concerted activity and that Respondent was motivated to discharge by that concerted activity.

*Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), defines *concerted activity*. "In general, to find an employee's activity to be concerted, we shall require that it be engaged

in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” The Board in *Meyers* stated that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether “specifically authorized” in a formal agency sense, or otherwise, we shall find the conduct to be concerted.

The analysis of the General Counsel’s evidence of motivation is subject to the causality test of *Wright Line*, supra.

The record shows that the method of dispatch, truck assignments, and accumulated miles by individual drivers were points of contention for many years. Over this period Allen and others voiced complaints to lower, midlevel, and upper level management. Allen was, on several occasions, a spokesman for the drivers, albeit mostly for those drivers most senior. There was a division among drivers based on relative seniority, but the numbers were basically equal. Half were senior and half were junior. As one would expect each group held opposing views toward the dispatch, the truck assignments, and the mileage accumulation. Seniors expected to get the choice of runs, the newer trucks, and the most mileage. Juniors expected an equalization of runs and mileage and to participate in new truck assignments. The dichotomy never changed. Management in an attempt to appease, vacillated from one remedial extreme to the other. When the pendulum swung in favor of the juniors discontent festered among the senior drivers. Respondent’s attempt to show that Allen was only one among several who brought complaints to management thereby negating any spokesman or leadership role for Allen is not availing. Neither is Respondent’s attempt to paint Allen as an individual concerned only with himself availing. Allen’s uncontroverted testimony of Carey’s remark to him in November 1987, “keep your mouth shut, the senior drivers aren’t running the dispatch anymore,” evinces both management’s opinion of Allen’s status among the drivers and the root cause for the senior drivers’ unrest. The evidence does show that drivers, other than Allen, spoke up or raised complaints to management, but a quantitative analysis of each driver’s role is not required. In certain circumstances ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefit of fellow employees. The existence of opposing factions among the employees does not denigrate the proposition. Allen’s individuality notwithstanding, the record manifests that Allen was a senior driver who spoke out for conditions favorable to the senior drivers and he was considered by the senior drivers as a leader. The law does not require that he be the only leader. In my view, Morialli’s quandary over Allen’s complaint about driver mileage at the December 16 meeting is instructive of Allen’s role. Morialli did not understand why Allen pursued a mileage complaint when he had the second highest mileage among the drivers. Thus, at the December 16 meeting the complaints made by Allen were for the good of the senior drivers and not Allen’s benefit alone.

Allen not only had an exemplary record as a driver for his 10 years of employment, he also had a respectable working relationship with Morialli, Manager Sutch, and Vice President Carey. Whether admittedly recognized or not, Allen’s status among the drivers was more than simply, a driver. Contrary to Respondent’s contention and Respondent’s evi-

dence, I conclude and find that it was Allen’s leadership status and his excellent driving record, composed not only of safety factors but economy factors as well, which precipitated management’s choice to have Allen train as driver instructor. Allen then trained other drivers in company-sponsored sessions. Moreover, Allen’s instructor status contributed to the esteem held by the other drivers for him. It is most plausible that Allen considered himself a leader of the senior drivers and assumed the role with the support of the other drivers. Respondent argues that Allen’s complaint was not “on the authority of other employees.” The record evidence clearly shows that Allen’s complaint on mileage was based in part on the weekly accumulation of mileage rather than the annual accumulation as explained by Morialli in the December 16 meeting. Whether Morialli understood the distinction or chose not to acknowledge does not change the nature of the complaint. The mileage complaint was an outgrowth of Morialli’s assignment of runs which admittedly was a concern of all drivers whether senior or junior and Allen discussed the issues on the CB radio with various drivers while on the road. The CB radio is the drivers’ forum. Allen’s credited testimony shows clearly that he voiced complaints that junior drivers were double teaming and getting the longer runs which allowed them to be home on weekends whereas the senior drivers were getting shorter runs requiring several dispatches and consuming more than 5 weekdays, which intruded on the weekends. Morialli admitted that the longer runs assigned to double teams was a complaint raised by Allen at the December 16 meeting. The law does not require that a group spokesman be specifically authorized by the group to act in some formal declarative manner. In my view neither is the spokesman’s action required to be contemporaneous with any given set of circumstances. Here, the subject of the complaints by Allen and others was continuous and spanned several years. Allen’s role as spokesman likewise was continuous over the same several year period. In fact an employee’s exercise of a spokesman role will endure unless and until it is retracted by those employees benefiting therefrom. Contrary to Respondent, I do not conclude from the record evidence that Allen was acting solely by and on behalf of himself. I therefore conclude and find that Allen was engaged in concerted activity when voicing complaints of dispatching, truck assignments, and mileage accumulation for the several years proceeding his discharge and particularly he was engaged in concerted activity during his two meetings with management on December 16.

I further conclude and find that the complaints voiced by Allen over the several years and particularly on December 16 in his meeting with Morialli and Sutch dealt specifically with driver wages, driver hours, and driver working conditions and therefore were protected by the Act.

In brief, Respondent places the onus of its knowledge of Allen’s concerted activity on Allen himself as if to imply that Allen must declare at the outset he is speaking on behalf of other employees. Although some employees may make such a declaration preparatory to engaging in a complaint session the law does not burden an employee so directly. Nor does the law exact such a burden of proof on the General Counsel. The General Counsel must only show that Respondent knew of the concerted nature of Allen’s activity from whatever source. There is a wealth of evidence in the record to support the inference that Respondent had knowledge of

Allen's concerted activity. Allen for years was at the forefront of the senior drivers' battles for changes in the dispatch system. His several encounters with higher level management specifically to initiate changes in the drivers' working conditions were documented in the success of the missions and the ultimate proscription against drivers dealing directly with corporate management instituted by Vice President Carey. Respondent attempted to credit a JAKE Allen with the origination of one such prior mission to higher management, but the substance was too vague to do so. Oddly enough that was the single reference to the other Allen, or any other driver, as related to any concerted activity or leadership role of a driver. The record references to Respondent's policy of soliciting complaints from drivers in no measure diminishes the role of a driver as spokesman for other employees. A spokesman for employees can exercise his role in response to solicitation as well as initiate discussions of issues. Viewing all the evidence in the record, I am not persuaded that Allen is less of a spokesman or leader than he testified he is. I am persuaded that Allen on many occasions acted as spokesman by presenting grievances for the senior drivers and when doing so Allen was recognized as spokesman for the other drivers and their grievances by Morialli, Sutch, and Carey. I am also persuaded that the division among drivers, senior and junior, was continuous and this division coupled with Respondents vacillation in dealing with the various complaints resulted in unresolved, or short-lived resolutions of, grievances for each group, alternatively. I therefore conclude and find that Respondent had knowledge of the concerted nature of Allen's activity on December 16 when meeting with Morialli and Sutch. My previous finding of Respondent's regard for Allen, as manifested in his selection as driving instructor, strengthens my finding of Respondent's knowledge of Allen's concerted activity.

Respondent stated that Allen was discharged as a direct result of his conduct in the December 16 meeting with Morialli and Sutch. Respondent denies that the substance of Allen's complaints had anything to do with his discharge citing Respondent's long history of driver complaints and the lack of any discipline associated with the complaints. Respondent claims rather that it was Allen's gross insubordination and threats to fellow employees during the meeting which prompted Allen's discharge. In the alternative Respondent contends that Allen's use of abusive and threatening language rendered his conduct unprotected.

The Board must strike a balance between an employer's right to govern the workplace and an employee's right to engage in concerted activities under protection of the Act. Some leeway is accorded employees when exercising protected activity. Albeit the most desirable conduct for employer-employee relations would be temperate, the realities of industrial life in such situations usually produces less than desired conduct. The case at hand is no exception. For years the management and the drivers had their differences over the dispatch system, truck assignments, and the method of accumulating individual mileage. Management recognized its past failures in employee relations by hiring an expert in the field of employer-employee relations. It was his job to help employees to maximize communications with management and thereby establish a less confrontational mode for dealing with work-related complaints. The expert had approximately

5 months of service with the employee program when the critical meeting between Allen and management occurred.

It is undisputed that Allen sought out management to register complaints associated with driver dispatch. Morialli, Sutch, and Allen testified that the double teams dispatch versus the individual drivers' dispatch as implemented by Morialli was the subject of the December 16 meeting. Morialli and Sutch state that Allen was upset and belligerent during the meeting whereas they two were restrained and calm. Although Allen denies that he directly threatened to "whip Morialli's ass," Morialli and Sutch state that Allen made the threat at least three times during the 15-30 minute meeting. With each threat Sutch told Allen to calm down so the issues at hand could be dealt with reasonably. Following one of the threats Morialli responded to Allen: "It might not necessarily be that way but that's not what we're here for." Morialli also stated that Allen at one point, when Morialli raised from the chair and shifted his sitting position said, "Come on hit me. I want you to hit me. I'll get you fired."

Allen testified that toward the end of the meeting he told Sutch and Morialli, "[Y]ou're going to fool with somebody one of these days and you're going to piss them off and they're going to come in here and its going to be more than that McDonald's deal out yonder. They're going to wind up killing all of us." Morialli testified that Allen's statement was, "if management don't quit f—king me around—upper management don't quit f—king me around, there's going to be a McDonald's style killing. There's going to be dead bodies laying everywhere." Morialli testified to his response to Allen, "I told him I was really and truly sorry he felt the way he felt." Although, while testifying to the substance of the meeting, Morialli stated, "*once again* Allen threatened a McDonald's style killing, mass killing," he later testified that Allen only made one reference to McDonald's. Sutch testified that Allen on only one occasion during the meeting said, "If this company doesn't stop f—king with me there's going to be dead bodies laying everywhere just like McDonald's in southern California. Dead bodies everywhere." Sutch's only response to Allen's remark was, "there's nothing we can do to resolve your problem I don't know what your real problem is." Sutch admitted that when the meeting ended, Allen complemented him as a fair-minded person and left the office. As Allen left neither Sutch nor Morialli escorted Allen from the premises or alerted the plant security or local police of any threats by Allen during the meeting.

Sutch testified that he reported to Stauffer, Respondent's general counsel and vice president, that Allen had threatened his supervisor using abusive language and threatened to kill people in the front office and management. Sutch and Stauffer then agreed that Allen should be discharged the following Monday. On Monday, Sutch told Allen he was being discharged for gross insubordination and threats to fellow employees which occurred in the December 16 meeting.

Stauffer instructed Morialli and Sutch to write a memorandum of what occurred in the meeting with Allen. Morialli's memo of December 20 states:

Allen said he was getting screwed on runs and mileage by Morialli letting double teams pick their runs; Allen called Morialli a liar; Allen told Morialli he would beat his ass at least 3 times and Allen stated, "If management did not change their ways, there would be

a McDonald's type killing, there would be dead bodies everywhere."

Sutch's memo of January 5, 1989, stated:

Allen said he was sick and tired of being f—ked; Allen presented information about dispatches made to other drivers which were incorrect; Allen threatened to whip Morialli's ass if he didn't shut up; Sutch told Allen nothing could be done to make a more fair dispatch system at which time Allen said, If people don't stop f—ing with him, there would be bodies everywhere, just like McDonald's in California.

Sutch credibly testified that his response to Allen's McDonald's reference was, "There's nothing we can do to resolve your problem. I don't know what your real problem is."

The three principals disagreed on what Allen said at the December 16 meeting, particularly the language used by Allen when threatening to "whip Morialli's ass" and the nature of the reference to the McDonald's California tragedy. Today's testimony of Morialli and Sutch is more colorful than the contemporaneous written accounts of December 20, 1988, and January 5, 1989, with the frequent inclusions "lying mother f—er," "whip him like a stepchild, or a mother f—king stepchild" and Allen killing "the front office employees" or "management employees" as part of the McDonald's reference. Additionally, Morialli and Sutch describe Allen's reference to McDonald's as a personal statement by Allen whereas Allen's testimony and Morialli's memo of December 20 describe the reference as impersonal. The differences are not reconcilable as simply degrees of recall by several witnesses to the same event. One version is less abusive and less personal than the other. The truth cannot be both, it must be one or the other. In determining what was said, or not said, the undisputed surrounding circumstances can be helpful. Allen impressed me as a forthright witness concerned with recalling the events as they occurred and without defensive hesitation as he testified and I credit his version of his remarks. On the other hand, Morialli and Sutch accumulatively emphasized the abusive nature of Allen's remarks to Morialli by successively increasing the use of foul language each time the event was recalled. They also augmented the personal nature of Allen's reference to McDonald's by adding to or intensifying the language constituting the alleged threat. I find Morialli's memo of December 20 to be instructive in assessing Morialli's testimony of Allen's remarks and his own explanation of the differences in his recall. The memo was written at a time less critical to proof of the events and when the events would be subject to greater recall. Also Morialli credibly testified that he told Allen he was sorry for him as the meeting was breaking up.

The admitted facts that Morialli and Sutch remained restrained and calm in the face of the alleged threats as shown by their live testimony lend credence to the limited substance of the remarks contained in Morialli's memo. It is most plausible that any threats by Allen substantial enough to raise a concern for safety of employees and management resulting in a discharge would have at the time of utterance caused a considerable amount of apprehension and fear. However, not the slightest concern for safety of employees or management was expressed or considered on December 16 following the close of the meeting. I cannot and do not credit the testi-

mony of Morialli and Sutch with regard to the abusive nature of the remarks made by Allen to Morialli or to Allen's reference to McDonald's. I conclude and find that Allen did on several occasions during the meeting tell Morialli that he would "whip his ass" but without the abusive and profane frills and that Allen did make an impersonal reference to the McDonald's tragedy in California when describing the Company's treatment of employees in the dispatch of runs.

Sutch's testimony of his report to Stauffer of the December 16 meeting is in contrast to the admitted emotional state of Sutch and Morialli at the close of the meeting whereas both testified that Allen was upset and belligerent during the meeting. Likewise, Stauffer's testimony that Sutch and Morialli were shocked, agitated, and upset when giving the report is in contrast to the same admissions and testimony of Allen's behavior. I find it instructive that Stauffer when telling the events leading to the discharge stated that the *McDonald's statement* standing alone was not sufficient to warrant discharge nor was any single threat to whip Morialli's ass in and of itself sufficient to support a discharge. Further, Stauffer did not inquire of Sutch or Morialli if they thought Allen was the type of person to carry out any of the threats.

It is abundantly evident to me that what took place in the December 16 meeting was later embellished to dramatic proportions. The testimony of the change in character and emotion for both Sutch and Morialli is obviously the result of subsequent consideration and appraisal of the incident. There is no other reasonable explanation for the baseless report of a threat of *mass killings in the front office* and the later affront to the admittedly common place "whip your ass" statements. Based on reasonableness of the circumstances and the contemporaneous responses to Allen during the meeting, I discredit Morialli's testimony of his fear of Allen's remarks and I discredit Sutch's opinion testimony of Allen's manner when making the remarks. Further, I discredit Sutch's testimony of his fear of Allen's remarks and the testimony of his predischarge report to Stauffer. Viewing all the record evidence relating to the December 16 meeting and including the the memoranda exhibits in the record, there is no plausible explanation at trial for Sutch's immediate enhancement of what actually occurred. Sutch's testimony of his report can only be explained as the causal support needed at trial for Stauffer's decision to discharge Allen. As noted previously, Stauffer stated that the threats attributed to Allen would only result in discharge if they were made with the intent to carry them out. However, Stauffer never determined prior to discharge whether Allen was the type of person to make good on such threat. If such threat had in fact been made and taken seriously, any reasonable person would have immediately sought the aid of enforcement authorities and taken steps to protect the innocent employees threatened. Termination alone, several days later, would be wholly inadequate. Here, absolutely no remedial steps were taken by Morialli, Sutch, or Stauffer. It was business as usual—an incongruous vignette in the face of what has been described as tantamount to a killing field. It is not inconsequential that after discharging Allen for gross insubordination and threats to fellow employees, the Monday following the Friday (December 16) meeting, the plant security, for the first time, was alerted to Allen's circumstances. Even then the alert was based solely

on Allen's nonemployee status and that he had no right to be *seen* on the property again.

Based on the factual findings above, I conclude and find that Allen's use of the phrase "whip your ass" was not accompanied by any physical acts or threatening gestures evincing an intent to cause one to be more apprehensive than when commonly used among employees in the plant. Morialli's reaction to the phrase on December 16 is instructive to my finding. I also conclude and find that Allen's characterization of Morialli as a "liar," whether accompanied by profane phraseology or not, is not so unusual among plant employees as to require discipline, especially the most severe form. Profane epithets among employees in the plant were the norm. I further conclude and find that Allen's impersonal reference to the McDonald's tragedy was more symbolic than threatening and was not accompanied by any physical manifestations of intent. Respondent's proffered reason for discharging Allen was not supported by substantial evidence and therefore was a pretext seized on to rid itself of an employee spokesman who no longer fit into its scheme of employer-employee relations. Allen's concerted activity on December 16 occurred at a time when Respondent was actively pursuing a program designed to encourage individual participation by all employees and not just the verbalizing few.

Accordingly, I find that the record as a whole supports the General Counsel's complaint allegation that Allen was discharged because he engaged in protected concerted activity. I further find that Allen's conduct in the critical meeting was not so egregious as to cause him to lose the protection of the Act while engaged in concerted activity. Respondent's action of discharging Allen therefore violates Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent by discharging its employee Richard Allen on December 19 because of his protected concerted activity has violated Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

3. The General Counsel has failed to sustain his burden of proof that Respondent discriminatorily discharged Richard Allen because of his union activities.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designated to effectuate the policies of the Act.

Having unlawfully discharged Richard Allen, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>4</sup>

<sup>4</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Alpha Resins Corporation, Piperton, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Richard Allen immediate and full reinstatement to the job from which he was discharged on December 19, 1988, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any earnings he lost, plus interest, as outlined in the remedy section of this decision.

(b) Expunge from its files any references to the discharge of Richard Allen and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to effectuate the backpay provisions of this Order.

(d) Post at its offices in Piperton, Tennessee, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS ALSO RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>5</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because they engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Richard Allen immediate and full reinstatement to the job from which he was discharged on December 19, 1988, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge or discrimination less any net interim earnings, plus interest.

WE WILL notify Richard Allen that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

ALPHA RESINS CORPORATION